IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2007

STATE OF TENNESSEE v. DAVID A. MANTEY

Appeal from the Criminal Court for Washington County
No. 29580 Lynn W. Brown, Judge

No. E2006-00143-CCA-R3-CD - Filed January 29, 2008

The defendant, David A. Mantey, was convicted of the sale of more than .5 grams of cocaine, a Class B felony, and sentenced as a Range I offender to 12 years' incarceration. In this appeal, the defendant asserts that (1) the trial court erred in the admission of certain evidence, (2) the evidence was insufficient to support his conviction, (3) the trial court committed plain error by failing to instruct on the lesser included offense of casual exchange, and (4) the sentence and fine imposed are excessive. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Richard L. Burnette, Johnson City, Tennessee (on appeal); and Gene G. Scott, Jr., and Alex Vanburen, Johnson City, Tennessee (at trial), for the appellant, David A. Mantey.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Joe Crumley, District Attorney General; and Stan Widener, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On November 10, 2003, Melvin Love, who was operating as an informant for the First Judicial District Drug Task Force, arranged to purchase $200 worth of crack cocaine from the defendant, whom he knew only as "Shaq." Drug Task Force Agent Greg Workman searched Mr. Love, fitted him with an electronic recording device, and gave him $200 in marked currency. Agent Workman also searched Mr. Love's car and placed a repeater in the trunk of the car to increase the transmission radius for the recording device. Agent Workman and Agent Carl "Ritchie" Walker followed Mr. Love in separate vehicles to the parking lot of the automotive service center of a nearby WalMart. Once in the parking lot, Agent Workman activated the recording equipment and heard Mr. Love place a call to "Shaq" from the pay telephone in WalMart. Agent Workman then recorded a

drug transaction between Mr. Love and Shaq. After the transaction, Agents Workman and Walker followed Mr. Love to a nearby parking lot, where Mr. Love turned over a plastic bag containing what appeared to be crack cocaine. Agent Workman searched Mr. Love and his vehicle again, and finding no currency or contraband, Agent Workman gave Mr. Love $20 for gas and left. Agent Workman field tested the substance given to him by Mr. Love and determined that it was a little over one gram of crack cocaine. Several hours later, Agents Workman and Walker located the defendant at the Jameson Inn in Johnson City. Upon searching the defendant's person, the agents discovered $10,048 in cash, including the $200 in marked currency that had been provided to Mr. Love for the earlier transaction.

During cross-examination, Agent Workman conceded that he did not actually observe the transaction between Mr. Love and Shaq. He also stated that he could not positively identify the defendant as Shaq. Agent Workman recalled that Mr. Love, who is also known as "Milly-Mill" or "Melli-Mel", told him that Shaq had a Superman tattoo on his right shoulder.

Tennessee Bureau of Investigation Forensic Scientist Sharon Silvers testified that the rock-like substance submitted for testing was .9 grams of cocaine base.

Melvin Love testified that he became an informant for the Drug Task Force after being arrested during a raid of his apartment in June 2003. Mr. Love stated that although he had not been promised any specific outcome in his pending cases, it was his understanding that his cooperation would be viewed favorably by the District Attorney. He also conceded that the District Attorney had recommended that he be released on a recognizance bond as a result of his cooperation and that he had been offered a favorable plea agreement by the State.

Mr. Love testified that on November 10, 2003, he contacted agents about "a buy with [the defendant], which his name is Shaq." He stated that he arranged to meet the defendant at WalMart. Before traveling to WalMart, Mr. Love was searched, fitted with an electronic recording device, and given $200 in marked currency. When he did not initially see the defendant, he went inside and called him from the pay telephone. He then met the defendant, who was wearing "boogie-down clothing" that covered his arms, and gave him the marked currency in exchange for a plastic bag containing crack cocaine. Mr. Love positively identified the defendant as "Shaq." When defense counsel showed Mr. Love that the defendant did not have a Superman tattoo, Mr. Love reiterated that the defendant's arms were covered at the time of the transaction and further explained, "There was two (2) people that I knew of that was that tall that had 'Superman.'" He stated that he was "just going from memory" of an earlier occasion when he told Agent Workman about the tattoo.

Agent Walker testified that as a result of his investigation, he traveled to the Jameson Inn in Johnson City, where he located the defendant and two women in one of the rooms. He performed pat-downs of each individual for officer safety and discovered $10,048 in cash in the defendant's front pocket. He placed the money on the bed, and Agent Workman confirmed that two 100 dollar bills were the same as those given to Mr. Love earlier in the evening. Although Agent

Walker conceded that it is possible for marked money to end up in general circulation, he would not have expected it to do so within several hours.

At the conclusion of the trial, the jury returned a verdict of guilty for the single charged offense, and imposed a fine of $100,000. The trial court, acting as thirteenth juror, affirmed the verdict of the jury.

I. Admission of the Tape-Recorded Drug Transaction

The defendant contends that the trial court erred by admitting a tape recording of the drug transaction into evidence and permitting it to be played for the jury because it was not properly authenticated by Agent Workman and because it contained inadmissible hearsay. The State asserts that the tape was properly admitted.

Generally, questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this court will not interfere with the exercise of this discretion in the absence of a clear abuse appearing on the face of the record. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Van Tran*, 864 S.W.2d 465, 477 (Tenn. 1993); *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006) (citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006)); *see State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). Authentication of evidence is governed by Tennessee Rule of Evidence 901, which provides in pertinent part as follows:

> (a) General Provision.
>
> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.
>
> (b) Illustrations.
>
> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (5) Voice Identification.

> Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> . . . .

Tenn. R. Evid. Rule 901.

Our supreme court has held that "tape recordings and compared transcripts are admissible and may be presented in evidence by any witness who was present during their recording or who monitored the conversations, if he was so situated and circumstanced that he was in a position to identify the declarant with certainty, and provided his testimony in whole, or in part, comports with other rules of evidence." *State v. Jones*, 598 S.W.2d 209, 223 (Tenn. 1980), *superseded on other grounds by statute, T.C.A. § 39-11-505, as stated in State v. Latham*, 910 S.W.2d 892, 895 (Tenn. Crim. App. 1995). Similarly, this court has held that a tape recording is admissible provided that the tape is properly authenticated, the recorded conversation is an accurate reproduction, and the voices are identified. *State v. Smith*, 612 S.W.2d 493, 498 (Tenn. Crim. App. 1980). "For authentication purposes, voice identification by a witness need not be certain; it is sufficient if the witness thinks he can identify the voice and express his opinion." *Stroup v. State*, 552 S.W.2d 418, 420 (Tenn. Crim. App. 1977) (citing *Auerbach v. United States*, 136 F.2d 882 (6th Cir. 1943)). "The weight of this identification is for the jury." *Id.* (citation omitted).

In this case, the State introduced the tape recording of the drug transaction during the testimony of Agent Workman. Agent Workman, who had no previous interaction with the defendant, did not positively identify the defendant's voice on the tape. Thus, the tape was not properly authenticated and should not have been admitted into evidence at that time. The trial court ruled, however, that because the State would "tie [the evidence] together" through the testimony of Mr. Love, it would allow the tape to be played during Agent Workman's testimony. The trial court also observed that "if they don't tie it together, you've got a mistrial." Although Mr. Love identified the defendant as the person that sold him the cocaine, he did not actually identify the defendant's voice on the tape recording of the transaction. In consequence, the State failed to "tie together" the evidence as promised. Accordingly, the evidence should not have been admitted.

Similarly, the tape recording, which qualifies easily as hearsay, *see* Tenn. R. Evid. 801, should not have been admitted as it satisfies none of the applicable exemptions to the hearsay rule. "[W]hether the admission of hearsay statements violated a defendant's rights under the Confrontation Clause is purely a question of law." *State v. Maclin*, 183 S.W.3d 335, 342 (Tenn. 2006) (citing *Lilly v. Virginia*, 527 U.S. 116, 125 (1999)). "The application of the law to the facts found by the trial court is a question of law" subject to de novo review. *Id.* at 343 (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)).

Had the defendant's voice been identified on the tape, the recording would have been admissible as an admission by a party opponent. *See* Tenn. R. Evid. 803(1.2); *State v. Lewis*, ___ S.W.3d ___, No. M2004-02255-SC-R11-CD, slip op. at 8-9 (Tenn. 2007). Without the appropriate identification, however, the tape recording does not qualify for this, or any other exception to the hearsay rule. Moreover, we do not agree with the ruling of the trial court that "[a]ny statement made by a drug dealer in this case is not hearsay. It's relevant for the fact that it was said . . . ." We are unaware of any "drug dealer" exception to the hearsay rule and do not espouse one here. Furthermore, the fact that a statement is relevant has no bearing on the determination of whether it is also inadmissible hearsay.

Although we have concluded that the tape recording should not have been admitted into evidence absent an identification of the defendant's voice, reversal is not required. Mr. Love did not identify the defendant's voice on the tape, but he did identify the defendant as the person that sold him .9 grams of crack cocaine. In addition, the $200 in marked currency that had been provided to Mr. Love to purchase the cocaine was found only hours later in the defendant's front pocket. Under these circumstances, the erroneous admission of the tape recording is harmless error beyond a reasonable doubt, having had no effect on the verdict. *See* Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

II. Sufficiency of the Evidence

The defendant asserts that the evidence is insufficient to support his conviction. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

Identity is an indispensable element of any criminal offense, *see White v. State*, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975), and may be established by either direct or circumstantial evidence, or both, *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975). The determination of identity is a question of fact for the jury after consideration of all competent evidence. *See Biggers v. State*, 411 S.W.2d 696, 697 (Tenn. 1967); *Sanders v. State*, 281 S.W. 924, 924 (Tenn. 1925); *State*

v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); *State v. Crawford*, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982).

In this case, the defendant concedes that the statutory elements of the sale of more than .5 grams of cocaine were met but asserts that the State failed to establish his identity as the perpetrator. We disagree. Although there were some inconsistencies in his description of the perpetrator, Mr. Love clearly identified the defendant at trial as the person who sold him .9 grams of cocaine on November 10, 2003. Moreover, $200 in marked currency was discovered in the defendant's possession only hours after the drug transaction. This evidence was sufficient to establish the defendant's identity as the perpetrator.

III. Casual Exchange

The defendant also complains that the trial court committed plain error by failing to instruct the jury on the lesser included offense of "simple possession or casual exchange." *See* T.C.A. § 39-17-418 (2003) (proscribing as a Class A misdemeanor the knowing possession or casual exchange of a controlled substance). The State contends that the defendant is statutorily precluded from presenting this issue on appeal. In the alternative, the State submits that any error was harmless beyond a reasonable doubt.

The offenses described in Code section 39-17-418 are lesser included offenses of the charged felony offense. *See, e.g.*, *State v. Helton*, 507 S.W.2d 117, 120 (Tenn. 1974); *State v. Johnny L. Burns*, No. M2005-01945-CCA-R3-CD (Tenn. Crim. App., Nashville, Feb. 26, 2007). Because the defendant's trial occurred after January 1, 2002, instructions on lesser included offenses were governed by the provisions of Tennessee Code Annotated section 40-18-110, which provides as follows:

> (a) When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any lesser included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

> (b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any lesser included offense charge.
>
> (c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, the lesser included offense instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal.
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> . . . .

T.C.A. § 40-18-110 (a)-(c) (2006). The terms of the statute unambiguously state that an issue regarding the failure to instruct on a lesser included offense may not be presented on appeal unless the lesser included offense instruction was requested in writing prior to the trial. In this case, there was no such request. Accordingly, we are statutorily barred from hearing the defendant's claim. The defendant also waived our consideration of this issue by failing to present it in his motion for a new trial. *See* Tenn. R. App. P. 3(e) ("In all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."); *see State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial); *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989).

"[W]hether properly assigned or not," however, this court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. *State v. Ogle*, 666 S.W.2d 58, 60 (Tenn. 1984). Before an error may be so recognized, however, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The word "plain" is synonymous with "clear" or equivalently "obvious." *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 732 (citations omitted).

In *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000), our supreme court adopted the standard announced by this court in *Adkisson*. There, we defined "substantial right" as a right of "fundamental proportions in the indictment process, a right to the proof of every element of the

offense, and is constitutional in nature." *Adkisson*, 899 S.W.2d at 639. Our supreme court also adopted *Adkisson*'s five factor test for determining whether an error should be recognized as plain:

> "(a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before [a reviewing court] will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283. Our supreme court also observed that "the 'plain error must [have been] of such a great magnitude that it probably changed the outcome of the trial.'" *Id.* (quoting *Adkisson*, 899 S.W.2d at 642) (internal quotation marks omitted).

The Supreme Court, addressing the virtually identical Federal Rule of Criminal Procedure 52, has observed that "[t]he Rule . . . reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 1592 (1982). The Court also noted "that the power granted [to appellate courts] by Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 163 n.14. Finally, the Court has held that "the burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S. Ct. 2333, 2340 (2004).

In this case, we are not convinced that a substantial right of the accused was adversely affected by the trial court's failure to instruct on the lesser included offense of casual exchange. Generally, "relief for error is tied in some way to prejudicial effect, and the standard phrased as 'error that affects substantial rights,' used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding." *Dominguez Benitez*, 542 U.S. at 81. An error "may be so plain as to be reviewable . . . , yet the error may be harmless and therefore not justify a reversal." *United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978); *see Adkisson*, 899 S.W.2d at 642.

Our Code provides that "[i]t is an offense for a person to knowingly possess or casually exchange a controlled substance." T.C.A. § 39-17-418(a) (2003). This court has held that "[a] 'casual exchange' contemplates a spontaneous passing of a small amount of drugs, for instance, at a party," *see State v. Copeland*, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998), and that "[a] casual exchange occurs when the transfer of the controlled substance is made without design," *State v. Carey*, 914 S.W.2d 93, 96 (Tenn. Crim. App. 1995) (citing *Helton*, 507 S.W.2d at 120). Here, the evidence of the defendant's guilt of the charged offense was more than sufficient. The proof

established that Mr. Love arranged via telephone to purchase cocaine from the defendant. The defendant then met Mr. Love at the pre-appointed location and gave him .9 grams of crack cocaine in exchange for $200 in marked currency. That same currency was later found in the front pocket of the defendant's pants. Under these circumstances, any error in failure of the trial judge to instruct on casual exchange is harmless beyond a reasonable doubt.

IV. Sentencing

Finally, the defendant contends that the trial court erred by imposing the maximum sentence and fine permitted by law. The State asserts that the defendant has waived each of these issues. In the alternative, the State submits that both the sentence and fine are proper.

A. Sentence

The defendant contends that the trial court failed to follow "the mandates of the Sentencing Reform Act of 1989" when imposing his sentence. He argues that he is entitled to a new sentencing hearing and that, in addition, he is entitled to be sentenced pursuant to the current version of the Sentencing Act because portions of the Act in effect at the time of his trial have been ruled unconstitutional.

When a defendant challenges the length of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id*. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

In arriving at the defendant's sentence of twelve years, the maximum within the range, the trial court found that the defendant's record of criminal convictions justified the maximum

sentence. The trial court, noting that had the State filed proper notice the defendant would have been sentenced as a Range II offender, observed that "his problem is he has three prior robbery convictions in the State of New York . . . which is effectively going to take him to the maximum." Defense counsel declined the trial court's invitation to offer proof at the sentencing hearing, stating, "[W]e feel relatively confident that's the way the court was going to go anyway in terms of sentencing because the statutory factors are there." The trial court reiterated that the defendant was entitled to a hearing to present "some factors the court's not considering" and defense counsel again declined the invitation, explaining "I've spoken with [the defendant] and . . . he recognizes that going through the sentencing guidelines, and anything that the court would discuss during the course of that . . . is academic." He added, "I'm confident my client understands that . . . it's going to end up at twelve years . . . no matter what we do. So, I think that we have no interest in having [a hearing]."

Given the defendant's concessions at the sentencing hearing, we find it difficult to blame the trial court for failing to more fully explain the imposition of a maximum sentence based upon the defendant's prior record. Although the trial court noted initially that the defendant's previous criminal history would likely result in the imposition of the maximum sentence, he provided the defendant with the opportunity to present evidence on the subject. More than once, the defendant conceded the propriety and inevitability of the twelve year sentence based upon the defendant's previous criminal history. Nevertheless, because we are statutorily bound to do so, we must review the sentence de novo with no presumption that the determinations of the trial court are correct.

Initially, our de novo review of the sentence is hampered because the defendant has failed to include the presentence report in the record on appeal. *See* Tenn. R. App. P. 24(b). It is the appellant's obligation to prepare a record that will allow for meaningful review upon appeal. *See id.* We cannot consider an issue unless the record contains a fair, accurate and complete account of what transpired below relevant to that issue. *State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993).

Nevertheless, we conclude that the trial court did not err by imposing the twelve-year sentence in this case. The defendant conceded that he had the requisite number of prior convictions to qualify for a Range II sentence, *see* T.C.A. §40-35-106 (2003) (describing a "multiple offender" as "a defendant who has received . . . [a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or . . . [o]ne (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony"), and that, as regards the enhancing factors, "the statutory factors are there." Because the use of a prior conviction to enhance a sentence is provided for in the Code, *see id.* § 40-35-114(2), and is not barred by the Sixth Amendment, *see Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), the trial court did not err by using the defendant's prior convictions to enhance his sentence. Moreover, given that the defendant admitted having a criminal record that included at least three felony robbery convictions, imposition of the maximum sentence was justified.

B. Fine

The defendant's final claim is that the trial court erred by imposing a $100,000 fine. The State submits that the defendant waived this issue by failing to present evidence regarding the fine at the sentencing hearing and by failing to include the issue in his motion for a new trial. In the alternative, the State asserts that the fine was not excessive.

We agree with the State that the defendant has waived our consideration of this issue. First, as the State correctly points out, the defendant failed to offer any proof at the sentencing hearing and made no objection to the imposition of the $100,000 fine set by the jury. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Also, consideration of this issue is not possible without the presentence report, which the defendant failed to include in the appellate record. *See* Tenn. R. App. P. 24(b).

CONCLUSION

Although the trial court erred by admitting into evidence the audiotape recording of the drug transaction, the error can be classified as harmless. The evidence of the defendant's guilt was sufficient. The defendant waived our consideration of the trial court's failure to instruct on the lesser included offense of casual exchange, and review of the issue under the plain error doctrine is not necessary. Finally, the sentence imposed was not excessive, and review of the imposition of the $100,000 fine is not possible because of the inadequate record. Accordingly, the judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE